

**IN THE HIGH COURT OF UTTARAKHAND AT
NAINITAL**

Second Appeal No. 55 of 2013

1. Smt. Pavitra Devi W/o Late Radheshyam R/o Lakhera Bhawan, Devi Marg, Kotdwar, District Pauri Garhwal.
2. Smt. Seema Lakhera, W/o Late Shridhar Lakhera, R/o Lakhera Bhawan, Devi Marg, Kotdwar, District Pauri Garhwal.
3. Smt. Guddi Devi W/o Sri Kamal Dhyani, R/o Shibbunagar, Kotdwar, District Pauri Garhwal.
4. Smt. Vimla Devi W/o Sachin Kukreti at present R/o Shibbunagar, Kotdwar, District Pauri Garhwal.

..... Appellants/Defendants

Versus

1. Sudhir Prasad Lakhera, S/o Late Narayan Datt, R/o Village Khairi Khurd, Shyampur, District Dehradun.

.....Plaintiff/respondent

2. Himanshu Lakhera S/o Late Shridhar Lakhera, R/o Lakhera Bhawan, Devi Marg, Kotdwar, District Pauri Garhwal.
3. Km. Priyanka Lakhera, D/o Late Shridhar Lakhera, R/o Lakhera Bhawan, Devi Marg, Kotdwar, District Pauri Garhwal
4. Km. Prateeka Lakhera, D/o Late Shridhar Lakhera, R/o Lakhera Bhawan, Devi Marg, Kotdwar, District Pauri Garhwal
5. Sudhanshu Lakhera S/o Late Shridhar Lakhera, R/o Lakhera Bhawan, Devi Marg, Kotdwar, District Pauri Garhwal

..... defendants/Respondents

Mr. Lok Pal Singh, Advocate, present for the appellant.

Mr. Devesh Ghildiyal, Advocate, present for the plaintiff/respondent No.1

Hon'ble Prafulla C. Pant, J.

Heard on admission.

2) This Second Appeal is directed against judgment and decree dated 20.12.2012, passed by Additional District Judge, Kotdwar (District Pauri Garhwal) in Civil Appeal No. 01 of 2011, whereby said court has dismissed the appeal.

3) Brief facts of the case are that a Suit No. 62 of 1991 was filed by the plaintiff/respondent No.1 Sudhir Prasad Lakhera for partition and accounting against the appellants/defendants. Said suit was decided by learned Civil Judge (Senior Division) Pauri Garhwal, vide his judgment and order dated 17.09.2003, whereby the suit was decreed for partition and accounting. Though, it was rightly mentioned in the said order that the preliminary decree be drawn, but another para was also added in the operative portion, directing the Deputy Nazir, Kotdwar, regarding partition of half share of the plaintiff/respondent No.1, so that final decree may be drawn. The record reveals that the defendants filed a Civil Appeal No. 5 of 2003, against the judgment and decree passed by the trial court which was dismissed vide judgment and decree dated 25.04.2007 by the District Judge, Pauri Garhwal. It is conceded by learned counsel for the parties before this Court that Second Appeal against the judgment and decree dated 25.04.2007, passed by the District Judge, Pauri Garhwal, stood affirmed as the Second Appeal was dismissed in limine, and Special Leave Petition was also dismissed by the Apex Court.

4) It appears that when the proceedings for final decree were on, an application 139C was moved before the trial court, making request for preparing fresh preliminary decree due to the death of one of the parties namely Shridhar Prasad. On said application, the trial court observing that the legal representatives of Shridhar Prasad were already on record, directed to prepare the preliminary decree as affirmed from the appellate courts. Consequently, it appears that a fresh preliminary decree dated 09.05.2011 was drawn by the Civil Judge (Senior Division) Kotdwar (which on the face of it, is totally erroneous for the reason that it has been drawn as if the suit was for the foreclosure of the mortgaged property, while actually suit was for partition and accounting). As such, the present defendants/appellants challenged the order dated 03.05.2011, and the consequential decree dated 09.05.2011, passed by the Civil Judge (Senior Division) Kotdwar, in Civil Appeal No. 01 of 2011. Said, Civil Appeal No. 01 of 2011, is dismissed by the Additional District Judge, Kotdwar, on the ground that the decree has already been prepared in pursuance to the judgment and order dated 17.09.2003, passed by the trial court. It further observed that the order dated 03.05.2011, was not the decree as such, the appeal could not have been maintained. With the above observation the civil appeal was dismissed as not maintainable. However, in Civil Revision No. 23 of 2011, filed by the plaintiff against the same order dated 03.05.2011, learned Additional District Judge, Kotdwar, vide its order dated 20.01.2012, set aside the order dated

03.05.2011, holding that the judgment dated 17.09.2003, and the consequential preliminary decree already stood affirmed in the first round of litigation up to the Apex Court, as such, neither any order of the kind, one dated 03.05.2011, should have been passed, nor such consequential decree dated 09.05.2011 should have been prepared.

5) In the above circumstances, since the order dated 03.05.2011 has already been set aside in Civil Revision No. 23 of 2011, by the lower appellate court/revisional court, the consequential decree dated 09.05.2011 (which is otherwise also erroneous, as it pertains to mortgage suit, and not to the partition suit) is a nullity.

6) For the reasons as discussed above, this Second Appeal has become infructuous, and as such liable to be disposed of, with the observation as above. Accordingly, the Second Appeal is disposed of, and it is clarified that the trial court may proceed (in accordance with procedure given in Code of Civil Procedure, 1908), with the proceedings of the final decree in pursuance to the preliminary decree already said to have been prepared in pursuance to the judgment and order dated 17.09.2003, passed by the trial court.

(Prafulla C. Pant, J.)